

MUNGER, TOLLES & OLSON LLP

RONALD L. OLSON
ROBERT E. DENHAM
CARY B. LERMAN
GREGORY P. STONE
BRAD D. BRIAN
GEORGE M. GARVEY
WILLIAM D. TENKO
JOHN W. SPIEGEL
DONALD B. VERRILLI, JR. P.C.*
TERRY E. SANCHEZ
STEVEN M. PERRY
JOSEPH D. LEE
MICHAEL R. DOYEN
MICHAEL E. SOLOFF
KATHLEEN M. McDOWELL
GLENN D. POMERANTZ
THOMAS B. WALPER
HENRY WEISSMANN
KEVIN S. ALLRED
JEFFREY A. HEINTZ
JUDITH T. KITANO
TED DANE
STUART N. SENATOR
MARTIN D. BERN
JONATHAN E. ALTMAN
KELLY M. KLAUS
DAVID B. GOLDMAN
DAVID H. FRY
LISA J. DEMSKY
MALCOLM A. HEINICKE
JAMES C. RUTTEN
RICHARD ST. JOHN
ROHIT K. SINGLA
CAROLYN HOCKER LUEDTKE
C. DAVID LEE
BRETT J. RODDA P.C.*
KATHERINE M. FORSTER
BLANCA FROMM YOUNG
SETH GOLDMAN
GRANT A. DAVIS-DENNY
JONATHAN H. BLAVIN
DANIEL B. LEVIN
MIRIAM KIM
HAILYN J. CHEN
BETHANY W. KRISTOVICH
JACOB S. KREILKAMP
JEFFREY Y. WU
LAURA D. SMOLOWE
KYLE W. MACH
HEATHER E. TAKAHASHI
ERIN J. COX
BENJAMIN J. HORWICH

BRYAN H. HECKENLIVELY
ELAINE J. GOLDBERG P.C.*
GINGER D. ANDERS P.C.*
MARGARET G. MARASCHINO
JOHN M. GILDERSLEEVE
ADAM B. WEISS
KELLY L. C. KRIEBS
JEREMY A. LAWRENCE
LAURA K. LIN
ACHYUT J. PHADKE
ZACHARY M. BRIERS
JENNIFER M. BRODER
KURUVILLA J. OLASA
JUSTIN P. RAPHAEL
ROSE LEDA EHLER
JOHN W. BERRY
ROBYN K. BACON
JORDAN D. SEGALL
JONATHAN KRAVIS P.C.*
JOHN L. SCHWAB
EMILY C. CURRAN-HUBERTY
MATTHEW S. SCHONHOLZ
L. ASHLEY AULL
WESLEY T.L. BURRELL
CRAIG JENNINGS LAVOIE
JENNIFER L. BRYANT
NICHOLAS D. FRAM
TYLER HILTON
VINCENT LING
LAUREN BELL P.C.
VICTORIA A. DEGTAREVA
JOHN B. MAJOR
RACHEL G. MILLER-ZIEGLER P.C.*
FAYE PAUL TELLER
JULIANA M. YEE
LAUREN C. BARNETT
NICK R. SIDNEY
SKYLAR B. GROVE
LAURA M. LOPEZ
COLIN A. DEVINE
DANE P. SHIKMAN
MAGGIE THOMPSON
ALLISON M. DAY
GIOVANNI S. SAARMAN GONZÁLEZ
STEPHANIE G. HERRERA
SARA A. MCDERMOTT
J. MAX ROSEN
ANNE K. CONLEY
DAVID W. MORESHEAD
ANDRE W. BREWSTER III
ROWLEY J. RICE

350 SOUTH GRAND AVENUE
FIFTIETH FLOOR
LOS ANGELES, CALIFORNIA 90071-3426
TELEPHONE (213) 683-9100
FACSIMILE (213) 687-3702

560 MISSION STREET
TWENTY-SEVENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-3089
TELEPHONE (415) 512-4000
FACSIMILE (415) 512-4077

601 MASSACHUSETTS AVENUE NW
SUITE 500E
WASHINGTON, D.C. 20001-5369
TELEPHONE (202) 220-1100
FACSIMILE (202) 220-2300

March 17, 2023

DAHIA MIGNOUNA*
BRANDON R. TEACHOUT
USHA CHILUKURI VANCE
ZARA BARI
BRENDAN B. GANTS*
LAUREN E. ROSS*
BENJAMIN G. BAROKH
ABE DYK
MICHELE C. NIELSEN
APRIL YOUNG-ROLL
MEGAN MCCREADIE
RAQUEL E. DOMINGUEZ
STEPHEN HYLAS
ARIEL TESHUVA
SHANNON GALVIN AMINIRAD
XIAONAN APRIL HU*
NATALIE KARL
ERINMA E. MAN
CARRIE C. LITTE
RUBY J. GARRETT*
JAMES R. SALZMANN
SAMIR HALAWI
ROBIN S. GRAY
JOSEPH MOSES
MICHAEL I. SELVIN
HUNTER V. ARMOUR
NATHANIEL F. SUSSMAN
OLIVER BROWN
PAUL E. MARTIN
REBECCA L. SCIARRINO
CORY M. BATZA
BRIAN R. BOESSENECKER
AVI REJWAN OVED
ROBERT E. BOWEN
RICHARD T. JOHNSON
GRACE DAVIS FISHER
LAUREN N. BECK
CALEB W. PEIFFER
GREGORY T. S. BISCHOPING*
JAMIE B. LUGURI
STEVEN B. R. LEVICK
SARA H. WORTH
WILLIAM M. ORR
GABRIEL M. BRONSHTEYN
JING JIN
ALEX C. WERNER
ROSIO FLORES
JESSICA O. LAIRD
ERICA C. TOOCH
EVELYN DANFORTH-SCOTT
SARAH E. WEINER*

LEONARDO MANGAT*
EVAN MANN
ANDREW T. NGUYEN
RACHEL M. SCHIFF
MIRANDA E. REHAUT
TIANA S. BAHERI
STEPHANY REAVES*
LAUREN E. KUHN
J. KAIN DAY
MINKEE K. SOHN
GARRETT SOLBERG
TED KANG
ADAM W. KWON
JOSEPH N. GLYNN
JEFFREY VIDES
SIMON K. ZHEN
CARSON J. SCOTT
AVERY P. HITCHCOCK
ELISSA WALTER
MADELYN Y. CHEN
CHRISTOPHER B. CRUZ
JARED T. KOCH
JERRY YAN
NICHOLAS NEUTEUFEL
JIMMY BIBLARZ
ADEEL MOHAMMADI
TAYLOR L. BENNINGER
CLARE KANE
OF COUNSEL
ROBERT K. JOHNSON
PATRICK J. CAFFERTY, JR.
PETER A. DETRE
BRADLEY R. SCHNEIDER
PETER E. GRATZINGER
JENNY H. HONG
KIMBERLY A. CHI
ADAM R. LAWTON
MICHAEL E. GREANEY
SARAH J. COLE
E. LEROY TOLLES
(1922-2008)
*ADMITTED IN DC,
ALL OTHERS ADMITTED IN CA

Writer's Direct Contact
(415) 512-4017
(415) 644-6917 FAX
kelly.klaus@mto.com

Mark Langer, Clerk
U.S. Court of Appeals for the District of
Columbia Circuit
E. Barrett Prettyman U.S. Courthouse and
William B. Bryant Annex
333 Constitution Ave., NW
Washington, DC 20001

Re: *American Society for Testing and Materials, et al., v. Public.Resource.Org, Inc.,*
No. 22-7063 (Argument Set for March 20, 2023)
Notice of Supplemental Authority Pursuant to Federal Rule of Appellate
Procedure 28(j)

Dear Mr. Langer:

Pursuant to Federal Rule of Appellate Procedure 28(j), Plaintiffs-Appellants American Society for Testing and Materials, National Fire Protection Association, Inc., and American Society of Heating, Refrigerating, and Air Conditioning Engineers, Inc. respectfully advise the Court of the introduction of a Bill entitled, the Protecting and Enhancing Public Access to Codes Act, S. 835 (the "Bill"). Senators Coons, Cornyn, Tillis, and Whitehouse introduced the Bill on March 16, 2023.

If enacted, the Bill would amend the Copyright Act to make clear that a standard that is protected upon fixation under § 102(a) of the Act "shall retain such protection, notwithstanding

Mark Langer, Clerk
U.S. Court of Appeals for the District of
Columbia Circuit
March 17, 2023
Page 2

that the standard is incorporated by reference, if the applicable standards development organization ... makes all portions of the standard so incorporated publicly accessible online at no monetary cost.” § 123(b). A copy of the Bill is attached as Attachment A to this letter.

The Bill, of course, is proposed legislation, not an act of Congress. *See* Reply Br. 8 (discussing prior proposed legislation on this issue). Appellants apprise the Court of this development as it is potentially relevant to the history of legislative activity in this area, a subject that is discussed in Appellants’ briefing. *See* Opening Br. 6-8, 35; Reply Br. 8, 10, 13-14, 20; *cf.* *United States v. Corona-Rivera*, 503 F. Appx. 500, 503 (9th Cir. Dec. 20, 2012) (referring to 28(j) letter regarding proposed amendment to Sentencing Guidelines).

Very truly yours,

/s/ Kelly M. Klaus

Kelly M. Klaus

Attachment

Cc: Counsel via ECF

ATTACHMENT A

118TH CONGRESS
1ST SESSION

S. _____

To amend title 17, United States Code, to reaffirm the importance of, and include requirements for, works incorporated by reference into law, and for other purposes.

IN THE SENATE OF THE UNITED STATES

Mr. COONS (for himself, Mr. CORNYN, Mr. TILLIS, and Mr. WHITEHOUSE) introduced the following bill; which was read twice and referred to the Committee on _____

A BILL

To amend title 17, United States Code, to reaffirm the importance of, and include requirements for, works incorporated by reference into law, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Protecting and En-
5 hancing Public Access to Codes Act” or the “Pro Codes
6 Act”.

7 **SEC. 2. FINDINGS.**

8 Congress finds the following:

1 (1) Congress, the executive branch, and State
2 and local governments have long recognized that the
3 people of the United States benefit greatly from the
4 work of private standards development organizations
5 with expertise in highly specialized areas.

6 (2) The organizations described in paragraph
7 (1) create technical standards and voluntary con-
8 sensus standards through a process requiring open-
9 ness, balance, consensus, and due process to ensure
10 all interested parties have an opportunity to partici-
11 pate in standards development.

12 (3) The standards that result from the process
13 described in paragraph (2) are used by private in-
14 dustry, academia, the Federal Government, and
15 State and local governments that incorporate those
16 standards by reference into laws and regulations.

17 (4) The standards described in paragraph (3)
18 further innovation, commerce, and public safety, all
19 without cost to governments or taxpayers because
20 standards development organizations fund the proc-
21 ess described in paragraph (2) through the sale and
22 licensing of their standards.

23 (5) Congress and the executive branch have re-
24 peatedly declared that, wherever possible, govern-
25 ments should rely on voluntary consensus standards

1 and have set forth policies and procedures by which
2 those standards are incorporated by reference into
3 laws and regulations and that balance the interests
4 of access with protection for copyright.

5 (6) Circular A-119 of the Office of Management
6 and Budget entitled “Federal Participation in the
7 Development and Use of Voluntary Consensus
8 Standards and in Conformity Assessment Activi-
9 ties”, issued in revised form on January 27, 2016,
10 recognizes the benefits of voluntary consensus stand-
11 ards and incorporation by reference, stating that
12 “[i]f a standard is used and published in an agency
13 document, your agency must observe and protect the
14 rights of the copyright holder and meet any other
15 similar obligations.”.

16 (7) Federal agencies have relied extensively on
17 the incorporation by reference system to leverage the
18 value of technical standards and voluntary consensus
19 standards for the benefit of the public, resulting in
20 more than 23,000 sections in the Code of Federal
21 Regulations that incorporate by reference technical
22 and voluntary consensus standards.

23 (8) State and local governments have also rec-
24 ognized that technical standards and voluntary con-
25 sensus standards are critical to protecting public

1 health and safety, which has resulted in many such
2 governments—

3 (A) incorporating those standards by ref-
4 erence into their laws and regulations; or

5 (B) entering into license agreements with
6 standards development organizations to use the
7 standards created by those organizations.

8 (9) Standards development organizations rely
9 on copyright protection to generate the revenues
10 necessary to fund the voluntary consensus process
11 and to continue creating and updating these impor-
12 tant standards.

13 (10) The people of the United States have a
14 strong interest in—

15 (A) ensuring that standards development
16 organizations continue to utilize a voluntary
17 consensus process—

18 (i) in which all interested parties can
19 participate; and

20 (ii) that continues to create and up-
21 date standards in a timely manner to—

22 (I) account for technological ad-
23 vances;

24 (II) address new threats to public
25 health and safety; and

1 (III) improve the usefulness of
2 those standards; and

3 (B) the provision of access that allows peo-
4 ple to read technical and voluntary consensus
5 standards that are incorporated by reference
6 into laws and regulations.

7 (11) As of the date of enactment of this Act,
8 many standards development organizations make
9 their standards available to the public free of charge
10 online in a manner that does not substantially dis-
11 rupt the ability of those organizations to earn rev-
12 enue from the industries and professionals that pur-
13 chase copies and subscription-access to those stand-
14 ards (such as through read-only access), which en-
15 sures that the public may read the current, accurate
16 version of such a standard without significantly
17 interfering with the revenue model that has long
18 supported those organizations and their creation of,
19 and investment in, new standards.

20 (12) Through this Act, and the amendments
21 made by this Act, Congress intends to balance the
22 goals of furthering the creation of standards and en-
23 suring public access to standards that are incor-
24 porated by reference into law or regulation.

1 **SEC. 3. WORKS INCORPORATED BY REFERENCE INTO LAW.**

2 (a) IN GENERAL.—Chapter 1 of title 17, United
3 States Code, is amended by adding at the end the fol-
4 lowing:

5 **“§ 123. Works incorporated by reference into law**

6 “(a) DEFINITIONS.—In this section:

7 “(1) CIRCULAR A–119.—The term ‘Circular A–
8 119’ means Circular A–119 of the Office of Manage-
9 ment and Budget entitled ‘Federal Participation in
10 the Development and Use of Voluntary Consensus
11 Standards and in Conformity Assessment Activities’,
12 issued in revised form on January 27, 2016.

13 “(2) INCORPORATED BY REFERENCE.—

14 “(A) IN GENERAL.—The term ‘incor-
15 porated by reference’ means, with respect to a
16 standard, that the text of a Federal, State,
17 local, or municipal law or regulation—

18 “(i) references all or part of the
19 standard; and

20 “(ii) does not copy the text of that
21 standard directly into that law or regula-
22 tion.

23 “(B) APPLICATION.—The creation or pub-
24 lication of a work that includes both the text of
25 a law or regulation and all or part of a stand-
26 ard that has been incorporated by reference, as

1 described in subparagraph (A), shall not affect
2 the status of the standard as incorporated by
3 reference under that subparagraph.

4 “(3) STANDARD.—The term ‘standard’ means a
5 standard or code that is—

6 “(A) a technical standard, as that term is
7 defined in section 12(d) of the National Tech-
8 nology Transfer and Advancement Act of 1995
9 (15 U.S.C. 272 note); or

10 “(B) a voluntary consensus standard, as
11 that term is used for the purposes of Circular
12 A-119.

13 “(4) STANDARDS DEVELOPMENT ORGANIZA-
14 TION.—The term ‘standards development organiza-
15 tion’ means a holder of a copyright under this title
16 that plans, develops, establishes, or coordinates vol-
17 untary consensus standards using procedures that
18 incorporate the attributes of openness, balance of in-
19 terests, due process, an appeals process, and con-
20 sensus in a manner consistent with the requirements
21 of Circular A-119.

22 “(5) PUBLICLY ACCESSIBLE ONLINE.—

23 “(A) IN GENERAL.—The term ‘publicly ac-
24 cessible online’, with respect to material, means

1 that the material is displayed for review in a
2 readily accessible manner on a public website.

3 “(B) RULE OF CONSTRUCTION.—If a user
4 is required to create an account or agree to the
5 terms of service of a website or organization in
6 order to access material online, that require-
7 ment shall not be construed to render the mate-
8 rial not publicly accessible online for the pur-
9 poses of subparagraph (A), if there is no mone-
10 tary cost to the user to access that material.

11 “(b) STANDARDS INCORPORATED BY REFERENCE
12 INTO LAW OR REGULATION.—A standard to which copy-
13 right protection subsists under section 102(a) at the time
14 of its fixation shall retain such protection, notwithstanding
15 that the standard is incorporated by reference, if the appli-
16 cable standards development organization, within a rea-
17 sonable period of time after obtaining actual or construc-
18 tive notice that the standard has been incorporated by ref-
19 erence, makes all portions of the standard so incorporated
20 publicly accessible online at no monetary cost.

21 “(c) BURDEN OF PROOF.—In any proceeding in
22 which a party asserts that a standards development orga-
23 nization has failed to comply with the requirements under
24 subsection (b) for retaining copyright protection with re-
25 spect to a standard, the burden of proof shall be on the

1 party making that assertion to prove that the standards
2 development organization has failed to comply with those
3 requirements.”.

4 (b) TECHNICAL AND CONFORMING AMENDMENT.—

5 The table of sections for chapter 1 of title 17, United
6 States Code, is amended by adding at the end the fol-
7 lowing:

“123. Works incorporated by reference into law.”.